STATE OF MICHIGAN

COURT OF APPEALS

BRIAN BONAR, Petitioner-Appellant,	UNPUBLISHED May 30, 2013
v	No. 310707 Tax Tribunal
DEPARTMENT OF TREASURY, Respondent-Appellee.	LC No. 00-410948

Before: BOONSTRA, P.J., and SAAD and HOEKSTRA, JJ.

PER CURIAM.

Petitioner, Brian Bonar, appeals as of right the Michigan Tax Tribunal's (MTT) order granting summary disposition in favor of respondent, Department of Treasury, and dismissing his appeal. Because petitioner failed to timely appeal the final assessment, dismissal of his appeal was appropriate; accordingly, we affirm.

This case involves an appeal from respondent's determination that petitioner, as a responsible corporate officer, was liable for Single Business Tax (SBT) and withholding tax deficiencies as a result of his involvement with The Solvis Group, Inc. (Solvis).

On June 1, 2009, respondent sent petitioner a letter advising him that respondent calculated an outstanding tax liability of $860,519.33 for Solvis. In a letter dated June 8, 2009, Attorney Norman Tipton sent a response to respondent indicating that petitioner had retained his services. Tipton denied any liability on petitioner's behalf, and wrote that petitioner had resigned from Solvis in December 2006. On August 5, 2009, petitioner completed a power of attorney, authorizing Tipton as his personal representative; however, petitioner identified "Dalrada Financial" (Dalrada) as the entity to which the power of attorney applied. The authorization contained no mention of Solvis. On September 9, 2009, respondent informed petitioner that "[t]he documentation you provided is not sufficient to release you as an officer responsible for this liability." A final assessment was issued on September 24, 2009, and sent by certified mail to petitioner.

On January 8, 2010, petitioner executed a limited authorization power of attorney, authorizing Attorney Edward J. Castellani to represent him in all SBT, sales, use, and withholding tax matters for the years 2005 through 2008. The power of attorney specified a "beginning authorization date" of January 13, 2010. In a letter sent to respondent dated February 1, 2010, Castellani denied the tax liability on behalf of petitioner. In response, respondent issued

a Determination of Corporate Officer Liability, dated July 1, 2010, indicating that it had canceled assessments against petitioner for December 2006. However, respondent stated that petitioner's documentation was insufficient to support the cancelation of the SBT assessment for December 2005, and the withholding assessments for October and November 2006. On August 12, 2010, Castellani wrote respondent, alleging that petitioner never received copies of the notices of intent to assess or the final assessments.

On December 7, 2010, petitioner appealed the final assessment to the MTT. Respondent moved for dismissal of petitioner's appeal, arguing that it was untimely and accordingly, petitioner failed to invoke the MTT's jurisdiction. On May 29, 2012, the MTT granted respondent's motion for dismissal in a written opinion. The MTT found that petitioner was properly served with a notice of intent to assess by certified mail dated July 8, 2009, and with the final assessments by certified mail dated September 17, 2009, at petitioner's last known address. Additionally, the MTT found that the power of attorney appointing Tipton as petitioner's representative was deficient, "primarily because it authorized Respondent to disclose information with respect to 'Dalrada Financial' rather than The Solvis Group." The MTT noted that, even though respondent sent documents only to petitioner, "each of these notices and correspondence was responded to by Mr. Tipton," thus indicating that Tipton received the documents. Accordingly, the MTT dismissed the petition as untimely, and this appeal ensued.[1]

"'This Court's review of Tax Tribunal decisions in nonproperty tax cases is limited to determining whether the decision is authorized by law and whether any factual findings are supported by competent, material, and substantial evidence on the whole record.'" *Toaz v Dep't of Treasury*, 280 Mich App 457, 459; 760 NW2d 325 (2008), quoting *JC Penney Co, Inc v Dep't of Treasury*, 171 Mich App 30, 37; 429 NW2d 631 (1988); see also Const 1963, art 6, § 28. "Issues involving the interpretation and application of statutes are reviewed de novo as questions of law." *Toaz*, 280 Mich App at 459.

MCL 205.22 requires a taxpayer to appeal the contested portion of an assessment to the MTT within 35 days.[2] MCL 205.8 sets forth the notice requirements and provides:

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[1] The MTT dismissed petitioner's appeal by granting respondent's motion for summary disposition pursuant to MCR 2.116(C)(4) (lack of subject matter jurisdiction). We note that respondent should have moved for summary disposition pursuant to MCR 2.116(C)(7) (statute of limitations) because the failure to timely file an appeal with the MTT merely results in the failure to *invoke* the MTT's jurisdiction. See, e.g., *Toaz v Dep't of Treasury*, 280 Mich App 457, 462; 760 NW2d 325 (2008). However, the MTT has subject matter jurisdiction over tax appeals even when that jurisdiction is not properly invoked in a particular case. MCL 205.731. Thus, MCR 2.116(C)(4) is not an appropriate ground for dismissal. Nevertheless, we will not reverse the MTT's order when it reaches the right result for the wrong reason. See *Taylor v Laban*, 241 Mich App 449, 458; 616 NW2d 229 (2000).

[2] MCL 205.22 provides in relevant part:

> If a taxpayer files with the department a written request that copies of letters and notices regarding a dispute with that taxpayer be sent to the taxpayer's official representative, the department shall send the official representative, at the address designated by the taxpayer in the written request, a copy of each letter or notice sent to that taxpayer. A taxpayer shall not designate more than 1 official representative under this section for a single dispute.

On appeal, petitioner does not dispute that his MTT appeal was untimely pursuant to MCL 205.22; however, he asserts that his failure to meet the 35-day requirement should be excused because respondent failed to mail copies of the final assessments to petitioner's attorney in violation of MCL 205.8.[3]

Respondent asserts, and the MTT found, that petitioner's authorization of Tipton as his personal representative only applied to matters involving Dalrada Financial, not Solvis.

Generally, a power of attorney must be strictly construed and cannot be extended by construction. *Long v City of Monroe*, 265 Mich 425, 427; 251 NW 582 (1933). This Court has recognized that

> "[i]t is a firmly established rule, frequently reiterated, that powers of attorney are strictly construed and cannot be enlarged by construction. Accordingly, a power of attorney which specifies the acts which may be performed may not be extended by construction so as to authorize performance of other acts not mentioned.

> (1) A taxpayer aggrieved by an assessment, decision, or order of the department may appeal the contested portion of the assessment, decision, or order to the tax tribunal within 35 days . . . .
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> * * *
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> (4) The assessment, decision, or order of the department, if not appealed in accordance with this section, is final and is not reviewable in any court by mandamus, appeal, or other method of direct or collateral attack.
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> (5) An assessment is final, conclusive, and not subject to further challenge after 90 days after the issuance of the assessment, decision, or order of the department, and a person is not entitled to a refund of any tax, interest, or penalty paid pursuant to an assessment unless the aggrieved person has appealed the assessment in the manner provided by this section.

[3] We note that in *SMK, LLC v Dep't of Treasury*, 298 Mich App 302, 310; 826 NW2d 186 (2012), this Court held that the department is required to give notice to both the taxpayer and the taxpayer's official representative before the 35-day period under MCL 205.22 begins to accrue. However, recently our Supreme Court granted leave to appeal. *SMK, LLC v Dep't of Treasury*, __ Mich __; 828 NW2d 21 (issued March 27, 2013). Nevertheless, as discussed *infra*, whether notice to petitioner's representative was required is not determinative to the outcome of this case.

* * *

> "The attorney may perform only those acts specified in the power of attorney, and the scope of his powers should be determined from a proper construction of the instrument. [*Crane v Kangas*, 53 Mich App 653, 655; 220 NW2d 172 (1974), quoting 1 Callaghan's Michigan Civil Jurisprudence, Agency, §§ 187-189, pp 309-311 (omission by *Crane*).]

Strictly construed, petitioner's power of attorney only authorized and obligated respondent to correspond with Tipton regarding petitioner's involvement with Dalrada Financial, not Solvis.[4] Because petitioner did not properly appoint Tipton as his personal representative for matters involving Solvis, respondent was not required to send Tipton copies of the final assessments. Thus, the 35-day appeal period of MCL 205.22 began to run when respondent sent petitioner the final assessments, on September 24, 2009. Petitioner appealed the assessments on December 7, 2010, far in excess of the 35-day limit. Thus, respondent failed to invoke the MTT's subject-matter jurisdiction regarding petitioner's appeal, and the MTT properly dismissed his petition. MCL 205.22; *Toaz*, 280 Mich App at 462; *Electronic Data Sys Corp v Twp of Flint*, 253 Mich App 538, 542-543; 656 NW2d 215 (2002).

Although the above analysis is dispositive, we feel compelled to note that the outcome here leaves us with a sense that this matter could have been handled better by both parties. It strikes us that a little communication and transparency may have enabled the parties to avoid an unfortunate result.

As petitioner notes, and respondent acknowledges, petitioner's California attorney, Mr. Norman Tipton, authored three letters to respondent, in the months preceding issuance of the Final Assessments, in which he indicated that he represented petitioner; he referenced Solvis, the account number, and the tax liability of Solvis for which respondent sought to hold petitioner liable; and he provided information to respondent in furtherance of petitioner's position that he should not be held liable. Respondent clearly knew that Tipton represented petitioner with respect to the very matter that is the subject of this tax dispute, retained his letters and the information he provided in its files on this matter, and even corresponded with petitioner about what it deemed to be deficiencies in the information provided. Moreover, petitioner provided respondent with a written, signed power of attorney, dated June 5, 2009, that identified petitioner as the "taxpayer," identified Tipton as petitioner's representative, supplied petitioner's social security number (albeit in the blank intended for "FEIN or Treasury Account No."), and identified that the type of authorization being given to Tipton by the power of attorney was a "General Authorization" that included the right to "receive mail (includes forms, billings, and payment notices)" and that applied to "all tax/non-tax matters and for all years or periods."

[4] While not relevant to the issue before us, we note that MCL 205.28, which makes it a felony to divulge facts or information obtained in the administration of taxes to any unauthorized individual, informs why respondent strictly construed the terms of petitioner's power of attorney.

That said, and putting aside for a moment the power of attorney issues, the fact that a taxpayer is represented by an attorney in a matter before respondent is not necessarily sufficient to satisfy the prerequisites for requiring respondent to provide the taxpayer's representative with additional notice under MCL 205.8. MCL 205.8 requires that a taxpayer "file[] with [respondent] a written request" for such additional notice. Clearly, this contemplates more than that an attorney has "appeared" on behalf of a taxpayer before respondent, or that respondent be actually aware that the taxpayer is represented by counsel. In fact, the administrative rules promulgated as the Taxpayer Bill of Rights provide in part that a taxpayer can secure representation before respondent, to the extent authorized by the taxpayer, by the representative's filing of "*either* an appearance in the dispute or written authorization as described in R 205.1006." Mich. Admin Code, R 205.1005(2) (emphasis added). Consequently, an attorney (or other person) can represent a taxpayer before respondent simply by filing an "appearance in the dispute."

By contrast, in order to charge respondent with the responsibility to send the additional notice required by MCL 205.8, the taxpayer must comply with the requirements of Rule 205.1006. That rule prohibits any employee of respondent from sending confidential information to any third party without "appropriate authorization from the taxpayer." Mich. Admin Code, Rule 205.1006(1)[5]. Petitioner correctly notes that no particular form is required to be submitted. Rather, the rule specifies that a "taxpayer's written authorization may be provided by filing any of the following completed documents: (a) . . . Michigan form C-1029 . . . . (b) . . . federal form 2848 . . . . (c) . . . *any other appropriate power of attorney or other taxpayer authorization*." *Id.* at (6) (emphasis added).

The taxpayer authorization also must be "written," and it "shall include" specified information. The word "shall" indicates a mandatory obligation. *Walters v Nadell*, 481 Mich 377, 383; 751 NW2d 431 (2008). The information that is required to be included as part of this taxpayer authorization includes the following:

> (5) The written authorization of the taxpayer shall include the following information:
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> (a) The taxpayer's name, address, and account number.
>
> (b) The time period for which the authorization is effective.
>
> (c) The name, address, and telephone number of the taxpayer representative.
>
> (d) The type of return, tax type, and period to be disclosed.

[5] It matters not that respondent accepted information that it received from Tipton on petitioner's behalf. Respondent "may accept tax information that is voluntarily offered by third parties, but, in the absence of appropriate authorization, may not disclose information to the third party." Mich. Admin Code, R 205.1006(10).

(e) The taxpayer's signature and the date of signature.

(f) A designation as to whether the taxpayer representative is given general authorization or limited authorization to act on the taxpayer's behalf. General authorization to act on the taxpayer's behalf includes authorization to do any of the following:

(i) Inspect or receive confidential tax information for all tax years and all tax matters.

(ii) Represent the taxpayer and make oral or written presentations of fact and argument for all tax matters and years.

(iii) Sign returns and enter into agreements for all tax matters and years. Limited authorization for specific tax matters includes authorization as to a specific type of tax, return, or year or period.

Limited authorization for specific tax matters includes authorization as to a specific type of tax, return, or year or period. [Rule 205.1006(5).]

Clearly, Tipton's letters to respondent (and respondent's knowledge of Tipton's representation of petitioner in this matter) do not satisfy these requirements. Most strikingly, they do not include petitioner's signature, and respondent therefore could not properly deem them to constitute "appropriate authorization from the taxpayer" under R 205.1006.

This brings us to the June 5, 2009 power of attorney that indeed was signed by petitioner. Petitioner did not use Michigan form C-1029 or federal form 2848, but instead used a Michigan Department of Treasury and Unemployment Insurance Agency (UIA) 151 form. As an "other appropriate power of attorney," it was a proper form by which to convey petitioner's authorization under Rule 205.1006(6).

Respondent contends that the authorization was deficient in a number of respects. For example, respondent argues that the power of attorney did not identify any specific dispute, any type of tax, any assessment number, or any tax period(s) in dispute, and that the box under "Treasury" was not checked." We find these asserted deficiencies to be less than compelling. We read Rule 205.106 to state that where, as here, there is a "General Authorization," there need not be any designation for a specific dispute, a type of return, a tax type, or period to be disclosed. Further, this General Authorization not only was "for all years or periods," but specifically designated the beginning authorization date as December 1, 2007, and specifically designated that there was no ending authorization date (and the form itself indicates that where no ending authorization date is provided, the named representative will be considered "authorized" until the taxpayer notifies respondent that the Power of Attorney is revoked). As for the unchecked "Treasury" box, the form presented only two options: "Treasury" and "UIA." Although the form could be used for UIA purposes, the fact is that it was here filed with respondent, not with Unemployment Insurance Agency and, in any event, the General Authorization extended to "all tax/non-tax matters."

Of greater significance, however, is the fact that the power of attorney specifically identified Dalrada as a component of "Taxpayer Information." While this identifier may have been included mistakenly, it was included nonetheless. While Dalrada and Solvis were related companies (Dalrada being the parent company of Solvis), there is nothing on the power of attorney form to so indicate. Further, "absent some abuse of the corporate form, parent and subsidiary corporations are separate and distinct entities." *VanStelle v Macaskill*, 255 Mich App 1, 13; 662 NW2d 41 (2003), quoting *Seasword v Hilti, Inc (After Remand)*, 449 Mich 542, 547; 537 NW2d 221 (1995). While employees of respondent may have had reason to suspect, under the circumstances, that petitioner's intent in executing the power of attorney extended beyond Dalrada to include all matters relating to petitioner, including those relating to Solvis, the face of the power of attorney was not so expansive. While common sense might suggest that a little communication might have been in order, even in the world of bureaucratic governance, it is not compelled by the law,[6] and this Court's charge is to interpret, not make, the law. See *Koontz v Ameritech Services, Inc*, 466 Mich 304, 319; 645 NW2d 34 (2002).

A power of attorney must be strictly construed. See, e.g., *Long v City of Monroe*, 265 Mich App 425, 427; 251 NW 582 (1933). Strictly construed, petitioner's June 5, 2009 power of attorney was limited to matters that related to petitioner's involvement with Dalrada. Consequently, there was no "other appropriate power of attorney," Rule 205.1006(6), and there was no "appropriate authorization from the taxpayer." Rule 205.1006(1). Respondent therefore was not required to send additional authorization to Tipton under MCL 205.8. The 35-day period for filing an appeal of petitioner's Final Assessments, MCL 205.22, therefore began to run when those assessments were issued, on September 17, 2009. Petitioner did not file his appeal until December 7, 2010, and therefore failed to properly invoke the jurisdiction of the Michigan Tax Tribunal.

Even assuming, however that the June 5, 2009 power of attorney was effective, and that respondent was therefore required to serve additional notice to petitioner's authorized representative, we conclude that petitioner's appeal was untimely. MCL 205.22 provides that a "taxpayer aggrieved by an assessment . . . may appeal the contested portion of the assessment … within 35 days … after the assessment . . . ." *Id*. This Court has interpreted that requirement in conjunction with MCL 205.8 to mean that, where the taxpayer has filed an "appropriate authorization," "the 35-day period of MCL 205.22 does not begin to run until notice has been given under both MCL 205.8 [notice to taxpayer's authorized representative] and MCL 205.28 [notice to taxpayer]." *SMK, LLC v Dep't of Treasury*, 298 Mich App 302, 310; 826 NW2d 186

[6] We note that, apart from requiring respondent to presume that a power of attorney has no expiration date where none is specified (and that it is effective, unless otherwise stated, on the date authorized or received), Rule 205.1006(7) authorizes but does not require respondent to request a taxpayer to otherwise clarify a power of attorney. *Id*. ("If a written authorization is otherwise incomplete, the department *may* request the taxpayer to supply missing or clarifying information." (Emphasis added). The word "may" indicates discretion. *Walters*, 481 Mich at 383.

(2012), lv granted, ___ Mich ___; 828 NW2d 21 (2013). However, in granting leave to appeal, our Supreme Court in *SMK* granted the Department of Treasury's motion to stay the precedential effect of the portion of this Court's opinion "regarding the statutory tolling ruling." *Id*. Consequently, this Court's holding in *SMK* (as to the 35-day period not beginning to run until additional notice is sent under MCL 205.8) currently has no precedential effect. MCR 7.302(I); MCR 7.209(A)(1).

Regardless, however, we find that petitioner's appeal was untimely. If the 35-day period was not tolled, then it expired 35 days after the issuance of the Final Assessments on September 17, 2009. If the 35-day period was tolled, then it would have commenced running at such time as respondent provided the Final Assessments to petitioner's authorized representative.

Effective January 13, 2010, petitioner supplied respondent with a second Power of Attorney, this time a "limited" one, identifying Mr. Edward Castellani as petitioner's authorized representative. By letter dated August 12, 2010, Castellani advised respondent that he had requested and obtained copies of the Final Assessments from respondent. Therefore, petitioner's authorized representative (under MCL 205.8) received from respondent, no later than August 12, 2010, a copy of the Final Assessments.[7] Consequently, even assuming that the 35-day period had been tolled until that time, it commenced running no later than August 12, 2010.[8] Petitioner did not file his appeal until December 7, 2010, and thus still did not file the appeal within the 35-day limitations period.

Additionally, we observe that Rule 205.1006(8) provides that a "taxpayer may name only 1 taxpayer representative for a single tax dispute or matter." Rule 205.1006(9) further provides that a properly filed authorization "shall be presumed to be valid unless the department receives notice that the authorization is no longer valid. By executing and filing a new written authorization, a taxpayer shall revoke a previously filed authorization that relates to the same tax dispute that is covered by the newly filed authorization." *Id*.

Consequently, even assuming that the June 5, 2009 power of attorney (naming Tipton as petitioner's authorized representative) was valid, petitioner was obliged to revoke that authorization upon filing the January 13, 2010 second Power of Attorney (naming Castellani as petitioner's authorized representative as to the same matter). Petitioner failed to do so, yet both petitioner and respondent clearly viewed Castellani as petitioner's authorized representative, with respect to the tax dispute at issue, after January 13, 2010. Petitioner further received a

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[7] Although Castellani's August 12, 2010 letter mistakenly refers to the Final Assessments as "Bills for Taxes Due (Intent to Assess)," the documents themselves are clearly labeled "Final Assessments."

[8] This conclusion does not depend, as petitioner asserts, on there being a second or third event in 2010 that constituted a new appealable decision. To the contrary, the appealable decision was the issuance of the Final Assessments on September 17, 2009. The relevant question is whether the 35-day appeal period commenced running then or as late as August 12, 2010. Either way, petitioner's appeal was untimely.

benefit from Castellani's representation, since on July 1, 2010, in response to Castellani's correspondence, respondent canceled the assessments issued against petitioner for the December 2006 tax period and forward.

Yet, the January 13, 2010 second power of attorney did not, on its face, purport to revoke the June 5, 2009 first power of attorney. The available boxes on the January 13, 2010 power of attorney form for "Change in Power of Attorney Representation" and "Revoke Previous Authorization" remained unchecked. The facsimile cover sheet with which Castellani submitted the January 13, 2010 power of attorney to respondent said nothing about revoking a prior power of attorney, but merely stated, "The post [sic] the attached Power of Attorney into your computer system." So the question arises as to the effect of this failure by petitioner to revoke.

Arguably, petitioner's failure to revoke could mean that, under Rule 205.1006(8)(9), the first power of attorney remained valid and effective, and the second power of attorney never came into effect. Since respondent never sent additional notice (under MCL 205.8) to Tipton pursuant to the first power of attorney (but only to Castellani pursuant to the second power of attorney), the 35-day appeal period arguably continues to be tolled (assuming it was ever tolled, and assuming, pending our Supreme Court's decision in *SMK*, that it could be).

Petitioner does not, however, effectively make this argument. Nor, we conclude, could he. It was petitioner who failed to comply with his obligation under Rule 205.1006(9) to revoke the June 5, 2009 power of attorney. It was petitioner who received a benefit from his subsequent authorization to Castellani under the January 13, 2010 Power of Attorney. Under these circumstances, we find petitioner estopped from arguing that the June 5, 2009 power of attorney remained effective after the filing of the January 13, 2010 power of attorney such that the 35-day appeal period was no longer tolled, if it ever was, after respondent's submission of the Final Assessments to Castellani (which occurred no later than August 12, 2010). See *Lewis v LeGrow*, 258 Mich App 175, 210; 670 NW2d 675 (2003)(reversible error must be that of the court below, not error to which the aggrieved party has contributed by plan or negligence); *Polkton Charter Twp v Pellegrom*, 265 Mich App 88, 96-97; 693 NW2d 170 (2005) (a party may not harbor error as an appellate parachute).

For all of these reasons, we affirm the Michigan Tax Tribunal's dismissal of petitioner's appeal.

Affirmed.

/s/ Mark T. Boonstra
/s/ Henry William Saad
/s/ Joel P. Hoekstra